



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bird Construction
File: B-240002; B-240002.2
Date: September 19, 1990

Maurice A. Bird for the protester.
M.W. Phillips for Phillips National, Inc., an interested party.
Vasio Gianulias, Esq., Department of the Navy, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where bidder has submitted only a facsimile copy of a bid bond as of the time of bid opening, the bid bond is of questionable enforceability and the bid was properly rejected as nonresponsive; since responsiveness cannot be established after bid opening, the defect in the bond cannot be cured by the bidder's submission of the original bid bond subsequent to bid opening.
2. Low bidder whose bid properly was rejected as nonresponsive is not an interested party to argue that second-low bidder's bid should be rejected where there is another bidder which could be considered for award if the second-low bid were rejected, since protester would not be in line for award even if the protest were sustained.

DECISION

Bird Construction protests the rejection of its apparent low bid and the award of a contract to Phillips National, Inc., under invitation for bids (IFB) No. N62474-89-B-6144, issued by the Department of the Navy for a facilities support construction contract at the Marine Corps Air Ground Combat Center, Twentynine Palms, California. The Navy rejected Bird's bid as nonresponsive because Bird submitted only a facsimile copy of the required bid bond with its bid at bid opening. In addition to challenging the rejection of its own bid, Bird contends that Phillips' bid should be rejected

049534 / 142080

because the amount of the bid guarantee accompanying Phillips' bid is less than that required by the IFB.

We deny the protest challenging the Navy's rejection of Bird's bid and we dismiss the protest concerning Phillips' bid.

The IFB required the submission of a bid guarantee in the amount of 20 percent of the bid price. Four bids were received by May 14, 1990, the bid opening date; Bird was the low bidder and Phillips was the second-low bidder. By letter dated May 23, Phillips protested to the agency, arguing that Bird's bid was nonresponsive because Bird had submitted a facsimile copy of the required bid bond. After reviewing the documents submitted by Bird at bid opening, the contracting officer determined that the bid bond was not an original document, but rather a facsimile copy which did not contain the original signature of the surety. By letter dated June 6, the agency rejected Bird's bid as nonresponsive because its bond lacked the original signature of the surety, and awarded the contract to Phillips.

Bird argues that the liability of the surety would not be affected by the fact that a facsimile of the bond form was submitted with its bid, since the bond contained Bird's "wet," or original, signature and contained the printed, transmitting telephone number of its surety. Bird maintains that there is an increasing trend in the bonding industry to transmit bonds by telefacsimile, followed by submission of the original by overnight mail; Bird is presumably arguing that its submission of the original bond, on May 16, 2 days after bid opening, should have cured any deficiency in its bond.

The determinative question concerning the acceptability of a bid bond is whether, in the event of a default by the bidder, the contracting agency could be certain the surety would be bound, based on the information in the possession of the contracting agency at the time of bid opening. See The King Co., Inc., B-228489, Oct. 30, 1987, 87-2 CPD ¶ 423. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. In these circumstances, the bond deficiency may not be corrected after bid opening; otherwise, a bidder essentially would have the option, after bid opening, of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system. See Contract Servs. Co., Inc.--Recon., B-226774.4, May 6, 1988, 88-1 CPD ¶ 441.

photocopies of bid bonds generally do not satisfy the requirement for a bid guarantee, because there is no way, other than by referring to the originals after bid opening, for the contracting agency to be certain that there had not been alterations to which the surety had not consented, and that the government, therefore, would in fact be secured. The King Co., Inc., B-228489, *supra*. Similarly, a facsimile bond, which is an electronically transmitted copy, is subject to the same uncertainty as a photocopy transmitted by mail; since it is not the original, there is no way to be certain that unauthorized alterations have not been made without referring to the original documents after bid opening. G&A General Contractors, B-236181, Oct. 4, 1989, 89-2 CPD ¶ 308. Accordingly, Bird's bid, which included only a facsimile copy of the bond without the surety's original signature, was properly rejected as nonresponsive.

It is of no consequence that the facsimile copy of the bond Bird submitted with its bid contained Bird's original "wet signature" since the bond did not contain the original signature of the surety, creating serious doubt about the liability of the surety which could be resolved only by referring to documents submitted after bid opening. It also is of no effect that Bird submitted the original bond after bid opening, since a bond deficiency of this nature may not be corrected after bid opening. *Id.*

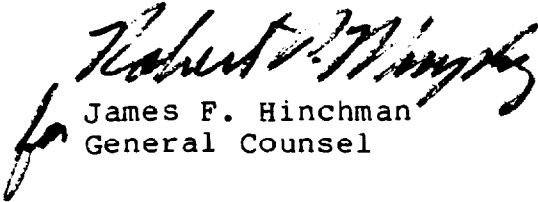
Bird also contends that Phillips' bid should be rejected because the amount of the bid guarantee accompanying Phillips' bid (\$100,000) is less than the amount required by the IFB (20 percent of Phillips' bid, or \$108,887). Bird, however, is not an interested party to raise this issue.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (1988), and our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1990), a protest may be brought only by an interested party, defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the contract at issue. A party will not be considered interested where it would not be in line for award even if its protest were sustained. JC Constr. Co., B-229486, Dec. 29, 1987, 87-2 CPD ¶ 640.

Here, since Bird's bid was properly rejected as nonresponsive, and there is at least one other bidder which could be considered for award if Phillips' bid was rejected, Bird would not be in line for award. Consequently, Bird is not an interested party to challenge the award on this basis.

Northwest Pesticide Enters., Inc., B-235982, Sept. 28, 1989,
89-2 CPD ¶ 284.

The protest challenging the rejection of Bird's bid is denied; the protest concerning Phillips' bid is dismissed.


James F. Hinchman
General Counsel